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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11

12 NUTRISHARE, INC., a California corporation,  
13 Plaintiff,  
14 v.  
15 BioRx, LLC, an Ohio Limited Liability  
Company,  
16 Defendant.

Case No. 2:08-cv-01252-WBS-EFB

Complaint filed June 4, 2008

**DEFENDANT BioRx, LLC'S OBJECTIONS  
TO EVIDENCE SUBMITTED BY  
PLAINTIFF IN SUPPORT OF ITS REPLY  
TO MOTION FOR PRELIMINARY  
INJUNCTION**

DATE: August 18, 2008  
TIME: 2:00 p.m.  
18 CRTM: 5

19  
20 Defendant BioRx, LLC ("BioRx") hereby submits the following evidentiary objections to  
21 the evidence cited below and filed by Plaintiff Nutrishare, Inc. ("Plaintiff") in connection with the  
22 reply in support of its Motion for Preliminary Injunction. BioRx hereby requests and moves that  
23 the Court sustain its objections and strike the evidence on the grounds set forth below:

24 **I. DECLARATION OF ELLEN J. TENUD IN SUPPORT OF REPLY**

25 BioRx objects generally to the declaration of Plaintiff's paralegal, who is not an  
26 independent expert but rather the mouthpiece of her employer (plaintiff's counsel of record), who  
27 apparently has never worked at the Patent and Trademark Office and therefore has no knowledge  
28

1 of their practices and procedures. Ms. Tenud's declaration is nothing more than the argument of  
 2 plaintiff's counsel masquerading as "testimony."

3 **Objection #1:**

4 Testimony: P. 2, lines 7-8, "The Examiner conducted an identical search in each case."

5 Ground(s) for objection: FRE 602, lack of personal knowledge; FRE 701, Improper  
 6 opinion testimony of a lay witness; FRE 802 (the witness is a paralegal employed by plaintiff's  
 7 counsel, not an independent expert, has no experience actually working at the Patent and  
 8 Trademark Office and therefore lacks the qualifications to testify as an expert regarding the  
 9 practices and procedures of the PTO).

10 **Objection #2:**

11 Testimony: P. 2, lines 6-8, "Based on my experience and in my opinion, the Examiner  
 12 would not have uncovered or been aware of the registered Nutrishare trademark based on the  
 13 search query."

14 Ground(s) for objection: FRE 602, lack of personal knowledge; FRE 701 about what the  
 15 Examiner uncovered or was aware of; Improper opinion testimony of a lay witness; FRE 802 (the  
 16 witness is a paralegal employed by plaintiff's counsel, not an independent expert, has no  
 17 experience actually working at the Patent and Trademark Office and therefore lacks the  
 18 qualifications to testify as an expert regarding the practices and procedures of the PTO).

19 **Objection #3:**

20 Testimony: P. 2, lines lines 9-10, "Specifically, the Examiner only reviewed marks that  
 21 contained the letters 'n(v)tr' and 'thr(v:)2)v'."

22 Ground(s) for objection: Ground(s) for objection: FRE 602, lack of personal knowledge  
 23 (no personal knowledge that the Examiner "only reviewed" what was disclosed in a public  
 24 database).

25 **Objection #4:**

26 Testimony: P. 2, lines 15-17, "As can be ascertained from the listing of marks, Nutrishare  
 27 was never before the Examiner or considered during the Examiner's analysis of the registrability  
 28 of the NutriThrive marks."

Ground(s) for objection: FRE 602, lack of personal knowledge about what was before the Examiner or considered by the Examiner; FRE 701, Improper opinion testimony of a lay witness; FRE 802 (the witness is a paralegal employed by plaintiff's counsel, not an independent expert, has no experience actually working at the Patent and Trademark Office and therefore lacks the qualifications to testify as an expert regarding the practices and procedures of the PTO).

## II. DECLARATION OF RODNEY OKAMOTO IN SUPPORT OF REPLY

### Objection #5:

Testimony: P. 2, line 8, "'on July 2, 2008, Mr Cesar did tell me that both he and the ACHC's Director of Accreditation, Sherry Hedrick, believed that the 'NutriThrive' and 'Nutrishare' names were very similar, that the public was likely to be confused between the 'NutriThrive' and 'Nutrishare' name, and that it was not in the best interest of the public to be confused."

Ground(s) for objection: FRE 802, hearsay; FRE 701, Improper (hearsay) opinion testimony of a lay witness (*i.e.*, improper hearsay regarding the purported opinion of Mr. Cesar and Ms. Hedrick).

Dated: August 13, 2008

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

By: s/ Amy Wintersheimer Findley  
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MICHAEL R. ADELE  
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BioRx, LLC

**CERTIFICATE OF SERVICE BY ECF**

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 501 West Broadway, 15th Floor, San Diego, California 92101.

On **August 13, 2008**, I electronically filed:

- **DEFENDANT BIORX, LLC'S OBJECTIONS TO EVIDENCE SUBMITTED BY PLAINTIFF IN SUPPORT OF ITS REPLY TO MOTION FOR PRELIMINARY INJUNCTION**

Said document(s) is/are available for viewing and downloading from the Court's ECF System and said document(s) was/were served upon all interested parties listed below in the manner indicated.

**Via CM/ECF System**

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I declare under penalty of perjury under the laws of the State of California that I am employed by a member of the bar of this Court and that the foregoing is true and correct.

Executed on **August 13, 2008**, at San Diego, California.

Susan L. Pierson

(Type or print name)



(Signature)